

**Statement of Rabbi David Saperstein on the Constitutional Role of Faith-Based
Organizations in Competition for Federal Social Service Funds**

**Subcommittee on Criminal Justice, Drug Policy and Human Resources of the U.S
House of Representatives
Committee on Government Reform
Rayburn House Office Building 2154
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Good morning Mr. Chairman, distinguished members of the Subcommittee. I am Rabbi David Saperstein, Director of the Religious Action Center of Reform Judaism which represents the North American Reform Jewish Movement's 1,800 rabbis and 900 synagogues encompassing over 1.5 million members. I am an attorney and for many years have taught church-state law on the faculty of Georgetown University Law School.

I am honored to be here with you this morning and would like to express my appreciation both to the committee and to my fellow witnesses who, in their own right, are all leaders dedicated to making our world a more just and whole place. We all agree that more needs to be done to better the plight of the poor, feed the hungry, clothe the naked, and assist our fellow citizens in finding meaningful, sustainable employment.

Mr. Chairman, we oppose the legislation under discussion here today, H.R. 1054, the "Tools for Community Initiatives Act," which would codify the President's Faith-Based Initiative through the formal creation of a permanent White House Office of Faith-Based and Community Initiatives. The creation of an office especially dedicated to helping government find appropriate ways to partner with religious organizations to deliver social services resonates powerfully with our religious sensibilities. Thus, it is not for this reason that we object to this bill. Our primary objection to the Office is based in no small measure on the work of the Office since it was created. We believe that direct government funding of houses of worship is unconstitutional, bad public policy and bad for religion. Such funding seems to be a major focus of the Faith Based Initiative, this legislation and the Office. Endorsement of the office on the grounds that it does a number of good things and has the potential to do more good things that are constitutional would constitute endorsement of a Trojan Horse that will facilitate programs that violate the Establishment Clause, undercut good social service programs, and infringe upon the rights of beneficiaries. These concerns are embodied in the prescriptions and directives expressed in the latter half of the bill ("Sec. 7 - Sense of Congress") which pose grave consequences for the autonomy of religion and the integrity of government in America.

In Sec. 7, expressed through the Sense of Congress, what we see are the essential ingredients necessary in implementing the President's Faith-Based Initiative. In other words, this is not the mere creation of a physical office, but a vehicle through which government funds will flow directly and dangerously into our houses of worship thereby imperiling religious autonomy, civil rights and the rights of beneficiaries. The "Sense of

Congress” section *hints* at providing protections such as safeguarding the rights of beneficiaries and separating the time and location of “inherently religious activities” (a term, by the way, that has never once been recognized or adjudicated by the Courts), but the net result of distributing funds directly to houses of worship, without any legal firewall or protection is, by its very nature, problematic for religion and government.

Although I could envision a time when such an initiative might be appropriate, this is certainly not that time. There is simply no evidence that the current Office is all that effective. An analysis of faith-based organizations who received FY 2003 funding through the President’s Faith-Based initiative in 2005, conducted by the Associated Press, found, among other things, that many of the organizations do not even characterize themselves as “faith-based” organizations at all.¹ In reference to the promise that the Office would have a real and positive impact on social service provision in America, even David Kuo, who served in the White House for two-and-a-half years as a Special Assistant to the President and later as Deputy Director of the Faith-Based Initiative, lamented recently that “sadly, four years later these promises remain unfulfilled in spirit and fact.”²

To be perfectly clear, we agree wholeheartedly with the President’s often cited remark that government cannot always “put hope in people’s hearts” and give people “a sense of purpose” the same way that religion can.³ It *is*, therefore, not surprising that almost all of our synagogues run social service programs. They range from homeless shelters to day care for homeless children so that parents can look for or go to work; from feeding programs to health care provision; from transitional housing programs aimed at helping the homeless get off the streets to literacy programs for kids in our schools. We are enormously proud of these efforts and we commend the President for his call to strengthen this work and to create closer partnerships between the government and the faith community.

However, we strongly oppose that component of the Faith Based Initiative that would involve direct government funding of our synagogues, indeed of any of America’s pervasively sectarian institutions.

Codifying this so-called “charitable choice” into law, as this legislation in fact does, is bad for religion, bad public policy, unconstitutional, and socially divisive.

Directly Funding Houses of Worship is Bad Public Policy

¹ “U.S. Gave \$1B in Faith-Based Funds in 2003” Laura Meckler, *Associated Press*. January 2, 2005

² “Shooting From the Heart: Please Keep Faith” David Kuo, posted on *Beliefnet*: <http://www.beliefnet.com/story/160/story_16092_1.html>

³ Remarks by President George W. Bush at Cityteam Ministries, San Jose, CA Oct 31, 2000 Qtd. in <http://www.issues2000.org/Celeb/George_W_Bush_Welfare_+Poverty.htm>

Before discussing the vital constitutional and legal reasons to oppose this broad and permanent attempt to codify charitable choice, I want to review a number of the policy reasons to be deeply alarmed about such government funding of houses of worship.

First, with government money come government rules, regulation, audits, monitoring, interference, and control. Your colleague Representative Chet Edwards has warned "it will be a religious nightmare to have federal agents, including IRS agents auditing the finance of churches, synagogue and mosques across the land."⁴ And he's right. Even on the issue of the effectiveness of the programs there will be intrusive monitoring. President Bush, for one, has often stressed the importance of accountability, arguing that schools and other recipients of federal funds need to be held accountable for the results they achieve, or fail to achieve. And he's not wrong. Taxpayers do have a right to know what results are being achieved with what the President often reminds us is their money. How can we effectively hold these programs to account without jeopardizing the sacred autonomy of our houses of worship? And besides: who defines a "successful" program? The government or the church?

Second, with government money come compromises in the religious mission of the churches, synagogues and mosques of America. Reliance upon government funding, creates the temptation to mute the prophetic obligation of calling the government to account. Religious leaders, whose moral clarity and leadership have brought about the most important and fundamental reforms in government and society, will be reluctant to bite the hand that feeds them. Further, when there are limits placed on religious activity in government-funded programs (as the Constitution demands), those churches committed to including such activities as essential to their programs must either compromise their mission to obtain the money or ignore the rules with potentially dire consequences to the beneficiaries of services and to the churches. For example, visitors to the TMM Family Services in Tucson, AZ are greeted by a picture of Jesus and quotes from the Bible. Either the beneficiaries who feel alienated walking through the door lose out, or the religious mission of the group is jeopardized, notes the director of the program.⁵ It's a lose-lose situation.

In addition to the threat to their traditional - and cherished - autonomy, government funding of houses of worship provides another, more subtle but equally alarming, danger: the undermining of the mission of the institution. To be sure, I don't think that erosion of the character of religious institution will be intentional or immediate. But it's likely nonetheless.

The *Wall Street Journal* reported an interesting example of the type of "mission creep" that is likely, perhaps inevitable, as religious institutions look to the government for

⁴ Representative Chet Edwards, Remarks at the Launch of the Pew Forum on Religion and Public Life (Mar. 1, 2001), at <http://pewforum.org/events/print.php?EventID=5>.

⁵ Meckler, *supra*

funding.⁶ Massachusetts subsidizes a large portion of charitable work undertaken by Catholic Charities in that state. In the mid-1990's, the state began to shift its funding priority from other areas to substance abuse. As the funding shifted, so did the programs offered by Catholic Charities. Programs such as soup kitchens and childcare closed, and drug and alcoholic treatment centers opened. By 1995, Catholic Charities in Massachusetts spent 80% of its funds on substance abuse programs.⁷

Stanley Carlson-Thies, an original staff member of the President's White House Office of Faith-Based and Community Initiatives and current director of social policy studies at the Center for Public Justice has termed this shift of emphasis "vendorism."⁸ Vendorism, he notes, is a "process in which government grants end up diverting the priority of charities, changing their direction and turning them into mere vendors of government programs."⁹ What a loss to our nation if our houses of worship were to become "vendors of government programs!"¹⁰

Third, by opening up our nation's limited funding for social services to, potentially, scores of thousands of houses of worship, countless millions of dollars will be diverted from, and thus weaken, what are widely regarded as the finest, most effective social service providers today - the superb (albeit overwhelmed) "religiously affiliated" social service providers (such as Catholic Charities, Jewish Federations, Lutheran Social Services etc.), all of which abide by the vast majority of regulations applicable to other charities. Without a national commitment to substantial increases in funding, there is no guarantee one more needy person will be helped by this ill-advised initiative.

Fourth, charitable choice will lead to increased social divisiveness in America. For Catholic charities and the Jewish federations to compete for grants is one thing. The local agencies they support are professional social service providers that, over the years, have worked out the pattern of funding and working relationships. Local houses of worship are altogether different. Choosing between them becomes like choosing between religions. Funneling the money directly to these houses of worship would pit them against one another -- the Episcopal Church, the AME Zion Church and the local mosque that are all competing for the same grant. One group gets the money, the others do not, and in all

⁶ Robert A. Sirico, *Charities on the Dole*, WALL ST. J., Mar. 31, 1995, at A12, available at <http://www.acton.org/ppolicy/editorials/sirico/charitydole.html>.

⁷ *Id.*

⁸ See Stanley Carlson-Thies, *Faith-Based Institutions Cooperating with Public Welfare: The Promise of the Charitable Choice Provision*, in WELFARE REFORM AND FAITH-BASED ORGANIZATIONS 29, 36 (Derek Davis & Barry Hankins eds., 1999).

⁹ *Id.* It should be noted that Carlson-Thies is a strong supporter of charitable choice, and while he lays out the problems, he also answers those challenges.

¹⁰ For a broader discussion of how government funding can compromise the religious mission of providers, see CHARLES L. GLENN, *THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES* (2000). Glenn focuses less on the dangers of regulation and more on the impact that reliance on government funding and the requirements to professionalize staff can have in altering the religious mission of the provider. See also Steven K. Green, *The Ambiguity of Neutrality*, 86 CORNELL L. REV. 692 (2001) (reviewing GLENN, *supra*).

likelihood, it's the religious minority who loses out. It is no small point that particular religious groups will unfairly receive more funds than others. In a 2005 poll of Louisiana citizens, those who described themselves as "fundamentalist Christians" supported direct government-funded social service provision by an almost 3 to 2 margin over the average citizen polled.¹¹ Recent Pew Forum polls show that substantial majorities feel that Buddhist and Muslim social service providers should not receive federal funds.¹²

The prospect of intense competition for limited funding; the politicizing of church affairs to obtain funds; the impact on those made to feel they are the outsiders when they fail to obtain the funds - this leads to the very kind of sectarian competition and divisiveness that have plagued so many other nations and which we have been spared because of the separation of church and state. Already, since the time the President's Office was first created, we have seen an unprecedented and marked divisiveness take root in our religious communities. Only three months ago, the Central Church of God in Charlotte, NC withdrew its support for a food pantry serving the needy because that pantry "promoted Catholicism."¹³ The same church also withdrew support from the Charlotte Rescue Mission because it had allowed three Muslim students from UNC Charlotte to help serve a meal.¹⁴ Rev. Jerry Falwell has suggested that Islamic organizations should never be eligible for funding, because the "Muslim faith teaches hate."¹⁵

Fifth, such funding violates the religious rights of the taxpayers. Again, Rep. Edwards hit the nail right on the head when he stated just recently that "that kind of divisiveness that we see bitterly in the U.S. Congress every year during the appropriations process should not be exported to our houses of worship in America."¹⁶ Even in cases where courts have held that taxpayers do not have standing to assert a free exercise claim to contest the use of their tax dollars for religious purposes, it still is wrong on a policy level and it exacerbates religious tensions. As Jefferson said: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."¹⁷ This helps explain why so many religious leaders - on the left and the right - oppose the program.

As a minority religious community in America, we have often been the targets of people who seek to convert us to their religion. At a hearing on this same type of legislation 4

¹¹ "Voters Split on Funds to Church Groups; 75% of Fundamentalists, 84% of Roman Catholics Favor Giving Tax Dollars." Barbara Schlichtman, *The Advocate* (Baton Rouge, LA). January 16, 2005.

¹² PEW FORUM ON RELIGION & PUB. LIFE & THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, FAITH-BASED FUNDING BACKED, BUT CHURCH-STATE DOUBTS ABOUND (2001), at <http://pewforum.org/events/0410/report>.

¹³ "Church Cuts Ties to Food Pantry Because of Catholics." *Associated Press*, March 19, 2005

¹⁴ *Id.*

¹⁵ Interview by Deborah Caldwell with Rev. Jerry Falwell, Jerry Falwell Ministries (Mar. 6, 2001), at http://www.beliefnet.com/story/70/story_7040.html.

¹⁶ "Bush's Faith Money Won't Come Easily: Despite Opposition, President Pushes Ahead With Grants to Religious Groups." Lisa Zagaroli, *Detroit News* 13A. January 9, 2005.

¹⁷ Virginia Act for Establishing Religious Freedom located at < <http://religiousfreedom.lib.virginia.edu/sacred/vaact.html>

years ago, the executive director of Teen Challenge, an acquaintance who I respect greatly, acknowledged that his program has the effect of converting (in his term, "completing") Jewish kids. Teen Challenge has every right to engage in this activity (as hurtful and wrong as I may think it is). But the notion that their efforts to convert our children will now be enhanced by our tax dollars which have freed up money to go about this work is, I hope, as troublesome to you as it is painful to us. That any taxpayer should fund her own discrimination or proselytization betrays every principle of our democracy.

Directly Funding Houses of Worship is Unconstitutional¹⁸

Four constitutional and legal issues compel rejection of these charitable choice proposals.

First, in all the discussion of all the cases that you have heard here today, there is one central principle, one legal standard, that you must keep in mind. The Supreme Court of the United States (and the vast majority of the lower courts as well) has never upheld direct government cash support for pervasively sectarian institutions. Indeed, in cases (many of which have been alluded to here today) where the High Court and other courts have upheld some type of government support for religious institutions, they have gone out of their way to distinguish it from exactly the kind of direct government subsidy of houses of worship and religious ministries and parochial schools that is entailed in charitable choice.

In *Bowen v. Kendrick*¹⁹, the case that upheld government support for religious groups that provided pregnancy care services and prevention services,²⁰ the Court said: "Even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion. One way in which direct government aid might have that effect is if the aid flows to institutions that are 'pervasively sectarian.' We stated in *Hunt* that:

[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."²¹

In *Rosenberger v. Rector & Visitors of the University of Virginia*²², upholding the use of student fees at a state university to pay for publications,²³ including religious publications, the court observed:

The neutrality of this program distinguishes the student fees from a tax levied for the direct support of a church... The Court of Appeals

¹⁸ See David Saperstein, "Public Accountability and Faith-Based Organizations: A Problem Best Avoided" Harv L Review 1353-1396 (2003)

¹⁹ 487 U.S. 589 (1988).

²⁰ See *id.* at 594, 622.

²¹ *Id.* at 609-10 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

²² 515 U.S. 819 (1995).

²³ See *id.* at 822-27, 845-46.

(and the dissent) are correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions."²⁴

The principle articulated in *Bowen and Rosenberger* was reaffirmed as recently as last year when a majority of the Court in *Mitchell v. Helms*²⁵ - two Justices who concurred in the holding allowing the loan of federally-funded computers to religious schools, joined by three dissenting Justices - noted the special concerns associated with the flow of government funds to pervasively religious organizations.²⁶ As Justice O'Connor noted in her concurring opinion, "Our concern with direct monetary aid is based on more than just [concern about] diversion [of tax-funded aid to religious uses]. In fact, the most important reason for according special treatment to direct money grants is that this form of aid follows precariously close to the original object of the Establishment Clause's prohibition."²⁷

The Supreme Court has noted that in pervasively sectarian institutions, religion is so subsumed in the entire program that it cannot be separated out, and since funding is fungible, a major program of support to any part of the institution will constitute government funding of religion, thereby violating the Establishment Clause. Common sense says the justices are right. And because support to any part of the institution is support to all of it, such government funding violates what has been a first principle of the First Amendment. On February 28, 1811, James Madison sent a veto message to the House of Representatives explaining his rationale for vetoing legislation that would provide direct funding for the Baptist Church at Salem Meeting House: "Because the Bill, in reserving a certain parcel of land of the United States for the use of the said Baptist Church, comprizes a principle and precedent for the appropriation of funds of the United States, for the use and support of Religious Societies; contrary to the Article of the Constitution which declares that Congress shall make no law respecting a Religious Establishment."²⁸

Second, the rights of beneficiaries would inevitably be infringed. In the real world, protecting beneficiaries will be difficult, and, I might add, all but impossible. How can we ensure that the promise of a non-sectarian provider of social services is made real, especially given the challenge of providing such services in rural or inner-city areas? How can we ensure that beneficiaries have the right, not just in theory but also in

²⁴ *Id.* at 840–42.

²⁵ 530 U.S. 793 (2000).

²⁶ See *Mitchell*, 530 U.S. at 837–44 (O'Connor, J., concurring); *id.* at 867–69 (Souter, J., dissenting). Some scholars would take issue with this interpretation. See, e.g., IRA C. LUPU & ROBERT W. TUTTLE, GOVERNMENT RELATIONSHIPS WITH FAITH-BASED PROVIDERS: THE STATE OF THE LAW 3 (2002), available at http://www.religionandsocialpolicy.org/docs/legal/reports/10-23-2002_state_of_the_law.pdf (characterizing *Mitchell* as leaving unanswered the question of the constitutionality of cash payments by government to pervasively sectarian entities).

²⁷ *Mitchell*, 530 U.S. at 856 (O'Connor, J., concurring); see also *id.* at 873–75, 909 n.27 (Souter, J., dissenting).

²⁸ James Madison Veto Message to Congress, Feb. 28, 1811 Qtd. in vol. 3, The Papers of James Madison, Presidential Series, p. 193.

practice, to decline to participate in religious exercises without jeopardizing their benefits? No matter what kind of protections charitable choice legislation tries to create, without extensive government surveillance such abuses will continue. And such surveillance, of course, poses its own set of risks for religious institutions.

Third, churches and synagogues have been (rightly!) exempted from many laws that would compromise their religious freedom, including the right to discriminate in whom they hire on religious grounds. Major government funding for programs with such exemptions may be constitutional but such a program can be part of a campaign to weaken civil rights and will give government sanction for dividing America along religious lines.

Since the High Court has determined that these exemptions are not mandated by the Constitution but are rather a constitutionally permissible means for the legislative body to accommodate religion, this debate over whether the flow of government funds should result in a lifting of the exemption is a statutory and policy argument. (It should be noted that there is a constitutional argument that granting a "religion specific" exemption for government funded programs is a violation of the Establishment Clause under the second prong of the Lemon test i.e. primary effect of advancing religion, particularly as applied in the *Texas Monthly, Inc. v. Bullock* case²⁹, prohibited the singling out of religion for a benefit. This remains an unresolved issue.)

So you are faced with a wrenching tension between two valid moral principles. The first is that government should accommodate the ability of religious organizations to function. To take the exemption away is to curtail that religious freedom in a manner that will threaten other exemptions. When religious groups buy into that they could be jeopardizing their birthright of a unique constitutional and legal status in exchange for the privilege of lining up at the public trough to fight among themselves over the porridge of government funds. The second is that government money should not be used to discriminate against protected classes of people. To grant the exemption, with anything more than incidental government funding behind it, is to turn back the clock on civil rights in this country, allowing for widespread discrimination on the basis of religious identity and practice. This is the approach of the recent reauthorization of the Workforce Investment Act (H.R. 27) passed only months ago by the House. The notion that a job notice could be placed in the newspaper seeking employees for a government funded social service program run by a Protestant church that reads "Jews, Catholics, Muslims need not apply" or "No unmarried mothers will be hired;" is deeply and profoundly troubling to many in the religious community, on Capitol Hill, and, according to a recent Pew Poll on this issue, to 78% of the American public.³⁰

²⁹ 489 U.S. 1 (1989).

³⁰ PEW FORUM ON RELIGION & PUB. LIFE, FAITH-BASED FUNDING BACKED, BUT CHURCH-STATE DOUBTS ABOUND (Apr. 10, 2001), at <http://pewforum.org/events/0410/report/execsum.php3>.

There is only one way to prevent this problem: don't violate the constitutional prohibition against direct government funding of sectarian organizations.

Only this will both protect religion and allow for robust, unqualified protections of civil rights. To give the money and then choose either to allow the exemption or to deny it, will pit many religious communities of America against the other civil rights communities. As was the case with the recent debate on exempting religious organizations from discriminatory hiring provisions in H.R. 27, this will foist on Congress an anguishing and politically explosive choice for the many Republican, Democratic, and Independent Members of Congress who are committed both to religious freedom and strong protections of other civil rights.

Finally, much has been made of the argument that all the proponents of charitable choice want is a level playing field, i.e., neutrality between religions and other groups. But it is not the opponents of charitable choice who concocted the idea of treating religion differently; it was the framers of the Constitution. Only religion has an Establishment Clause with all of the attendant protections and limitations that imposes. To abandon this idea in pursuit of "a level playing field" is a political time bomb for religion in America. To insist that religion be treated just like everything else is, again, to jeopardize the many special treatments and exemptions that religion enjoys. Why would those who intend to enhance religious protections advocate that? If we insist on treating religion "equally" to obtain funding, others will argue we should do so in all matters. This is particularly puzzling from some of my colleagues here who have been eloquent in arguing in the Free Exercise realm that facial neutrality, (i.e., treating religion like everything else), is not what is constitutionally called for. Rather the Constitution requires the functional neutrality of government towards religion. And the best way to achieve that is to keep government and religion separate even at the cost of direct government funding of religious institutions. For 200 years, the wall separating church and state has kept religion free of government interference, protecting the religious freedom of all, and allowing religion to flourish with remarkable vitality and strength. Taking the sledgehammer of government funding to the wall would be a major retreat from the vision of our founders.

A Better Path

There is much to commend in the President's Faith Based Initiative and there are myriad ways that government and the religious community can partner to strengthen the religious community's social service work and, together, to better serve our nation's poor and needy.

There are many constitutional ways to achieve our common goals: providing technical assistance and training programs for staff of all groups; best practice sharing³¹; targeted research on how to improve programs; reducing, or even eliminating, fees for all small organizations, including churches and synagogues, to establish separately incorporated

³¹ See Charity Aid, Recovery, and Empowerment Act of 2002, S. 1924, 107th Cong. § 502 (calling for sharing of best practices as well as legal assistance, technical assistance with grant writing, and capacity building resources).

501(C) social service arms to assist the poor; providing more and better information to the public about available programs; and encouraging charitable contributions through appropriate tax relief.³²

Together, with mutual respect and some hard work, we can affirm religious liberty, protect our Constitution and our religious institutions, maintain religion's vital role in the public square, and promote the excellent work our religious institutions do in carrying out their prophetic mission to help those in need.

³² *See id.* § 101.